

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WUA XIONG,

Petitioner,

v.

WARDEN DITTMAN,

Respondent.  
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ORDER

12-cv-901-bbc

In an order entered on August 23, 2013, I denied petitioner Wua Xiong's petition for writ of habeas corpus as untimely pursuant to 28 U.S.C. § 2244(d). In doing so, I did not address the issuance of a certificate of appealability under Rule 11 of the Rules Governing Section 2254 Cases. Now, petitioner has filed a motion for issuance of a certificate of appealability. Dkt. #15. Petitioner's request will be denied.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v.

Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated in the August 23 order, reasonable jurists would not debate whether petitioner is entitled to relief under 28 U.S.C. § 2254. Therefore, no certificate of appealability will issue. Petitioner is free to seek a certificate of appealability from the court of appeals under Fed. R. App. P. 22, but that court will not consider his request unless he first files a notice of appeal in this court and pays the filing fee for the appeal or obtains leave to proceed in forma pauperis.

#### ORDER

IT IS ORDERED that petitioner Wua Xiong's motion for issuance of a certificate of appealability, dkt. #15, is DENIED.

Entered this 18th day of September, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge